

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LARRY C. STUART,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
DIVISION OF ADULT PAROLE SUPERVISION,

Respondent.

This three-day hearing was held on November 1, 2, and 3, 2000 before Administrative Law Judge Mary S. McClatchey. Complainant was represented by William S. Finger, Frank & Finger, P.C. Respondent was represented by Assistant Attorney General Cristina Valencia, Colorado Office of the Attorney General.

PRELIMINARY MATTERS

Witnesses.

Complainant called the following witnesses: himself, Tom Coogan, former Director of the Division of Adult Parole ("the Division"), Department of Corrections ("DOC"); William Fitzgerald, Deputy Director of the Division; David Ramirez, Community Programs Agent II, Colorado Springs office of the Division; William Gallegos, Parole Officer II, Pueblo office of the Division; Richard Thompkins, Human Resources Specialist II, Employment Services Division, DOC; Lawrence Ullo, Parole Officer II, Colorado Springs office of the Division; Gene Fleming, Parole Officer III, Colorado Springs office of the Division; Deborah Duran, Parole Officer II, Pueblo office of the Division; and Phillip Aragon, Parole Officer II, Pueblo office of the Division.

Respondent called the following witnesses: Richard Thompkins (see above); and Bonita McCee, Regional Manager, Western Region, former Regional Manager, Southern Region.

Exhibits.

Complainant's Exhibits 1 - 11, 13 - 16, 18 - 27, 29 - 32, 34, 35, and 38 - 46 were admitted by stipulation. Exhibits 17 and 28 were admitted without objection. Exhibits 33, 47, 49, and 50 were admitted over objection. Complainant withdrew Exhibits 36 and 37, and did not offer Exhibits 12 or 48.

Respondent's Exhibits A, B, C, and D were admitted by stipulation.

Confidentiality Order: The following Exhibits are hereby placed under seal and are deemed subject to the Confidentiality Agreement and Order entered on November 1, 2000: Exhibits 1, 2, 3, 5, 8, 9, 10, 13 - 16, 24 - 27, and B.

Procedural Matters.

The parties stipulated that Complainant had presented the first three elements of a prima facie case of discrimination under Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397, 400-401 (Colo. 1997), namely, Complainant: belongs to a protected class, applied for a position for which he was qualified, and was rejected.

The record was held open until December 12, 2000 for the purpose of accepting the parties' written closing arguments and responses thereto.

A witness sequestration order was entered.

MATTER APPEALED

Complainant appeals his non-selection for the position of Parole Supervisor in the Pueblo office of the Division, alleging that Respondent's action was discriminatory on the basis of age, and was in retaliation for engaging in conduct protected under the Colorado Anti-Discrimination Act. For the reasons set forth below, Respondent's action is rescinded.

ISSUES

1. Whether Respondent's non-selection of Complainant was arbitrary, capricious or contrary to rule or law;

2. Whether Respondent's non-selection of Complainant constituted intentional age discrimination;
3. Whether Respondent's non-selection of Complainant was in retaliation for reporting discriminatory conduct and for filing previous charges of discrimination, harassment, and retaliation;
4. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant, Larry Stuart, commenced employment with the Division of Adult Parole Supervision as a Parole Officer II in 1993.
2. In 1995, Complainant was promoted to Parole Officer III, in which he was responsible for supervising a work unit of Parole Supervisor I's, II's, and Interns.
3. The appointing authority for the Division was Tom Coogan, Director of the Division of Adult Parole Supervision from 1989 through his retirement in May of 2000. The chain of command for the Division was as follows: Coogan supervised four Regional Managers. The Regional Managers supervised Parole Supervisors, for which there was one per office. Parole Officer III's such as Stuart served as Lead Workers and assisted the Parole Supervisors in supervising Parole Officer I's II's and Interns. On July 1, 1999, Coogan added a new layer to this chain of command by hiring a Deputy Director of the Division, William Fitzgerald.
4. On August 23, 1999, DOC posted a job vacancy announcement for the Parole Supervisor position in Pueblo.
5. On September 1, 1999, Complainant applied for the Parole Supervisor job in the Pueblo office. He was 52 at the time (date of birth 4/24/47).
6. On August 24, 1999, Robert A. McDonald applied for the Parole Supervisor position. He was 41 at the time (date of birth 2/20/58), and had held the position of Parole Officer II in the Colorado Springs office for three years.

Recent History of Pueblo Office

7. In 1997, when Stuart transferred to the Pueblo office, Thomas McGuire was

the Parole Supervisor. The office ran smoothly at that time. Stuart was responsible for the direct supervision of a number of Parole Officer I's, II's and Interns, and the nature of his position was such that he worked closely with McGuire in leading the Pueblo office.

8. Over the course of 1998 and 1999, McGuire's autocratic and micromanaging style began to offend the staff, who were predominantly Hispanic.
9. One Hispanic officer, William Gallegos, had a confrontation with McGuire. McGuire called him a derogatory name and Gallegos felt it was racially motivated. Gallegos filed a grievance and a civil lawsuit alleging discrimination.
10. Hispanic staff felt McGuire's management style was discriminatory on basis of race. There was a lot of racial tension in the office.
11. The fact that no Hispanics had been promoted to leadership roles in the Pueblo office contributed to the racial tension there.
12. Many of the Hispanic staff talked to Stuart about their feelings regarding McGuire. When Stuart discussed the issues with McGuire, and explained Gallegos felt the problem was racially motivated, McGuire was unwilling to listen.
13. Stuart also explained to McGuire that diversity issues were important to him, particularly since his wife was Hispanic. After that conversation, McGuire stopped communicating with Stuart, and informed Stuart of his decisions through memos.
14. McGuire had a meeting with employees regarding their complaints about him. After everyone except Stuart had left the office, McGuire, red-faced and very angry about the meeting, stated, "I wish you could have heard what went on in that meeting. They think it's racial. I'll make it racial."
15. Until he heard that statement, Stuart had felt McGuire's problems with staff were not racial. After hearing it, he believed that McGuire's problems with the Hispanic officers were race-based.
16. Stuart felt that DOC regulations prohibiting discrimination required that he report McGuire's statement and behavior to Bonita McCee, Regional Manager of the Southern Region of the Division. He feared that the racial tensions in the office could soon become physical.

17. Stuart told McCee about McGuire's statement, and explained that he felt that McGuire's initial problem of micromanagement had escalated to the point that it was a racial issue. He also told McCee that McGuire had stopped talking to him after he had told him his wife was Hispanic, and he perceived that to be discriminatory against him.
18. McCee reported all information from Stuart regarding McGuire to Coogan, including the fact of Gallegos's discrimination lawsuit. Coogan determined that the complaints against McGuire were justified.
19. In July 1999, a week after Stuart's discussion with McCee, Coogan removed McGuire as Parole Supervisor in the Pueblo office and transferred him to the Colorado Springs office.
20. Gene Fleming, an African American male, Acting Supervisor in the Colorado Springs office, agreed to act as Interim Parole Supervisor in the Pueblo office. He was a 17-year veteran of the Division.
21. Fleming worked closely with Stuart to turn the office around and gain the trust of employees. The office gradually started to function more effectively as a team again.
22. On October 25, 1999, Stuart assumed the Acting Parole Supervisor position and Fleming returned to Colorado Springs. Stuart continued to oversee the turnaround of the office and is universally perceived by staff as critical to bringing unity and calmness back to the office.
23. After his removal, McGuire told Pueblo parolees that Stuart had gotten him "thrown out of Pueblo." Stuart asked McCee to counsel McGuire about it, and said if she didn't he would need to write a memo about it, since the incident impinged his ability to do his job.
24. McCee responded to Stuart that he could document it, "but remember we've got this supervisor position coming open and Coogan doesn't like people who make waves or rock the boat," or words to that effect. Respondent called McCee as a witness at hearing and McCee did not deny having made this statement to Stuart.
25. Stuart wrote a memo and gave it to McCee.
26. The majority of Stuart's subordinates in the Pueblo office testified on his

behalf at hearing regarding his management style. All testified with conviction that Stuart is held in extremely high esteem by those he supervises, is trustworthy, honest, and a person of high integrity. They testified: he sets goals for officers and assists them in achieving them; he has a genuine interest in his subordinates' careers; he is open to discussing any problems or issues officers need help with; and he doesn't play favorites. Fleming characterized Stuart as dedicated, specific in his instructions to others, a person who obeyed rules and stuck by policies and procedures, and who made sure to communicate with others in the office.

27. On December 28, 1999, Coogan received the referral list for the Parole Supervisor position, containing Stuart, Robert McDonald, David Ramirez, and Lawrence Ullo.
28. Coogan and his Deputy Director Fitzgerald conducted interviews with all four final candidates. The interviews lasted approximately ten minutes. Coogan quickly narrowed the list down to Stuart and McDonald.

Coogan's Hiring Process

29. Coogan testified that he never reviewed the resumes submitted by Stuart or others prior to appointing McDonald.
30. Coogan testified he did not consider jobs previously held by Stuart and McDonald, whom they had supervised, and the degree and abilities each had in supervision, in making his decision.
31. Coogan testified that he made no effort to ascertain Stuart's supervisory experience prior to making the appointment.
32. Coogan testified that he did not know Stuart had been a Parole Officer III since 1995, did not ask how long he had been in that position, and did not check to see if Stuart had been a Team Leader, at the time he selected McDonald. He testified further that he was unaware of Stuart's professional experience prior to his current position as Parole Officer III, that he did not attempt to familiarize himself with it, and that he was not aware of most of the information on Stuart's resume at the time he made the appointment. Coogan was generally aware Stuart had been a sergeant in a police agency at some time in the past.
33. In his interview of Stuart, Coogan did not ask Stuart about his background, about his prior DOC experience, or about his supervisory experience.

Coogan did ask how he had managed to settle things down in the Pueblo office, to bring it back to the level previous to McGuire. Coogan did not ask where he would take the office if appointed Supervisor.

McDonald's Qualifications

34. McDonald's experience, as reflected on the resume he submitted, was as follows:
- Parole Officer II, Colorado Springs office, Division of Adult Parole, DOC, 1996 - present. Supervise specialized parole caseload of Chronic Mental Ill parolees; supervise specialized caseload of sex offenders; assist in investigation and apprehension of parole fugitives; member of Internet Crimes Against Children Task Force.
 - Parole Officer I, Westminster office, Division of Adult Parole, DOC, 1993 - 1996. Supervised regular Parole caseload of over 90 parolees; supervised specialized Intensive Supervision Program caseload; back-up Gang coordinator; assisted in investigation and apprehension of parole fugitives; member of Habitual Offender Tracking Team; implemented protocol for processing felony filings in Adams County.
 - Correctional officer, DOC, 1992-1993. Worked with inmates initially entering correctional system; security assignments included Master Control, External Security, and Inmate Escort.
 - Instructor/Adjunct Faculty, Anthropology and Archaeology, Pikes Peak Community College, 1997 - present.
 - Project Archaeologist/Teaching Assistant, University of Colorado at Colorado Springs, 1989-1992.
 - Vice President/Assistant Manager, Stewart's Photo Service, Inc., Colorado Springs, 1978-1991.
 - M.A. Colorado State University, Anthropology, 1992.
 - B.A. University of Colorado at Colorado Springs, Anthropology, 1988.

Stuart's Qualifications

35. Stuart's experience as reflected on his resume included the following:

- Parole Officer III, Pueblo office, Division of Adult Parole, DOC, 1995 to present. Supervise adult parole caseload and maintain files in approved DOC format. Audit cases and files of parole officer I's, II's and interns; investigate parole and criminal violations by parolees; prepare cases for presentation to DA and Parole Board; testify.
- Parole Officer II, Division of Adult Parole, DOC, 1993 - 1995. Supervised Intensive Supervision parole caseload; maintained files in approved DOC format; conducted background investigations of proposed parole sponsors; and investigated all aspects of proposed parole plans. Fugitive Investigator for Southeast Parole Operations, using all recognized investigative techniques to locate and apprehend parole fugitives, working closely with outside law enforcement agencies; presented new criminal charges for prosecution.
- Corrections Manager (Major), DRDC, DOC, 1992 - 1993, and Limon Correctional Facility, DOC, 1990-1992. Responsible on 24-hour basis for operations of Security Division of prison; areas of responsibility included: general facility security, budget requests, personnel management; investigated inmate grievances and resolved those within his authority.
- Correctional Supervisor (Captain), Arkansas Valley Correctional Facility, DOC, 1988-1990. Shift/Housing Unit Supervisor, ranking staff member at facility. Responsible for personnel evaluations, scheduling, and complaint resolution. Inmate grievances.
- Correctional Specialist, Arkansas Valley, DOC, 1987 - 1988. Case manager for 75 inmates, managed their activities/program involvement, maintained files in approved DOC format.
- Correctional Technician, Arkansas Valley, DOC, 1987. Operated master control for facility, first line supervisor for correctional officers, investigated security violations and inmate grievances.
- Correctional Officer, DOC, 1986-87. Operated control unit for close security housing unit.
- Police Sergeant, Springfield Missouri Police Department, 1983 - 1986. Acting Lieutenant as required. Responsible for scheduling, payroll, staff evaluations, investigations into non-criminal complaints against

department officers. Supervised crime scenes; investigated crimes; supervised criminal investigations by subordinates; obtained search warrants; collected evidence; located and interviewed/interrogated witnesses/suspects; made arrests; assisted prosecutors in preparing cases; testified in court.

- Police Detective, Springfield Missouri Police Department, 1979 -1983. Same as above starting with "Supervised crime scenes."
 - Police Corporal, Springfield PD, 1975 - 1979. Major Crimes Investigator - performed initial investigations at major crime and fatality/injury accident scenes; processed the scene; obtained warrants, collected evidence, made arrests, assisted with investigations, testified.
 - Police Officer, Springfield PD, 1970 - 1975. Issued traffic summons, investigated criminal activity, gathered information from witnesses and suspects, made arrests, testified.
 - B.S. in Law Enforcement and Corrections, Drury College, Springfield, Missouri, 1977.
36. In December, 1999, Coogan appointed McDonald to be a Parole Officer III in the Colorado Springs office. (This was a few weeks prior to his January 6, 2000 appointment as Parole Supervisor in Pueblo.)
37. Law enforcement training was important to the Parole Supervisor position. The Colorado legislature recently empowered and required parole officers to obtain certified peace officer training and certification. Parole Officers must carry firearms on the job and must at times make arrests of parolees.
38. Stuart's law enforcement experience was very useful in his work in Adult Parole. Many parolees have drug problems and Stuart's police background and training in narcotics and detective work assist him in understanding the evidence needed to make a case, write a report containing all necessary information, obtain warrants, testify in court, and talk to defendants so as to protect their rights during case investigations.
39. Stuart has utilized his experience in drug and detective work to informally train Adult Parole officers on the job.
40. At Limon, Stuart supervised 80 people. At the DRDC facility he supervised 90.

41. A comparison of the two candidates' experience follows:

Stuart

McDonald

Division of Adult Parole:

Division of Adult Parole:

Directed a recognized
work unit of Parole Officers in Parole Division
in Parole Division for four years

Had never directed a recognized work unit

Parole Officer III for four years

Parole Officer III for one month

Parole Officer II for three years

Parole Officer II for four years

Parole Officer I three years

Prior DOC experience:

Prior DOC experience:

Major, Captain, five years of
supervisory experience in
DOC prison facilities

No supervisory experience

Corrections Officer one year

Corrections Officer one year

Law Enforcement Experience: Law Enforcement Experience:

Police Sergeant, Detective, No prior law enforcement experience
five years of supervisory
law enforcement experience

Education:

Education:

B.S. in Law Enforcement and
Corrections

No formal education in law enforcement
or corrections

Pueblo office:

Pueblo office:

Helped guide Pueblo office
back on track. Respected by
all officers in office.

No experience in Pueblo office.

Reasons Given by Coogan for Hiring McDonald

42. After being rejected for the position, Stuart requested a meeting with Coogan, at which he asked Coogan why he hadn't been appointed. Coogan told him that it was one of those decisions that has to be made, but did not provide a specific reason for choosing not to appoint him.
43. Stuart filed a grievance contesting his non-selection. Coogan's written response to the grievance, dated January 20, 2000, states, "Mr. Stuart is an excellent officer but McDonald is too. His experience in different areas of parole is just as good, if not better than Mr. Stuart."
44. Coogan signed a sworn affidavit submitted to the Board for this case, dated May 9, 2000. He testifies that he "selected Mr. McDonald as being the person best suited for the position, in part, because of his strong interpersonal skills." "I determined Mr. McDonald was better suited for the position because of his superior interpersonal skills and the particular demands of the office." At hearing, Coogan did not provide an explanation of the particular demands of the Pueblo office for which McDonald was better suited.
45. At hearing, Coogan testified that he hired McDonald because "he needed fresh blood there." When asked what he needed a change from, he did not answer the question, but stated that he had plans for Mr. Stuart.
46. Coogan also testified at hearing that he viewed Stuart as having alliances with staff in the Pueblo office, that he hired McDonald because he had "no preconceived ideas. No alliances." He testified that McCee had told him that Stuart had alliances with people in the Pueblo office.
47. Coogan was asked for a clarification of the "alliances" he perceived Stuart to have. He testified that prior to filling the Southern Regional Manager position, there was a big dispute between the two Parole Supervisors who reported to that Manager as to whom should be hired. Factions and sides were taken in the Colorado Springs and Pueblo offices. Coogan testified that he didn't want the same thing to happen in Pueblo.
48. Neither Coogan nor any other witness offered any evidence of factionalism regarding this appointment; therefore, the comparison appeared to make no sense. When it was pointed out that there was no such factionalism regarding the choice of Stuart or McDonald, and that everyone in the Pueblo office wanted Stuart to get the position, Coogan reiterated that he did not

want dissension in either office, and said, "I wanted someone new, it was my prerogative."

History of Stuart's Applications for Supervisor Positions, Grievances and EEOC Charges; Ages of Other Parole Supervisors.

49. Stuart first applied for the Pueblo Parole Supervisor position in 1997, made the eligible list, interviewed, and was told by Coogan that he had done well, hang in there, he had plans for him.
50. After the interviews for that position, on June 11, 1997 the regional manager sent a letter to the three finalists, congratulating them on doing extremely well, and stating in part, "**If you handle your disappointment well** and exercise a bit of patience, we will be calling on you in the near future as positions of greater responsibility present themselves. Mr. Coogan will be discussing this with you individually in a few days." (Emphasis added.)
51. Coogan hired McGuire, who was the same age as Stuart.
52. In July of 1997, Complainant filed a grievance alleging age discrimination, harassment, retaliation and failure to promote. The basis for the harassment and retaliation claims is not in the record.
53. Coogan never contacted Stuart to discuss his future promotional opportunities in the Division.
54. In 1998, DOC had two more Parole Supervisor positions open, for which Stuart applied.¹ The two individuals chosen were younger than he, ages 32 and 36.
55. On September 16, 1998, Stuart filed an age discrimination claim and retaliation claim against DOC for failing to promote him to the Parole Supervisor position.²
56. The basis of Stuart's 1998 retaliation claim was his having testified as a witness in a case of discrimination involving another DOC employee.
57. In 1999, Coogan hired Stanley Zagorski as a Parole Supervisor. Zagorski was two years older than Stuart.

¹ Complainant has always indicated a willingness to re-locate to any region in his applications.

² Complainant placed number ten on this eligible list, but believed that his placement on the list was in error.

58. In 1995, Coogan had appointed a woman Stuart's age and a man four years older than Stuart to be Parole Supervisors.
59. McCee testified that it was one of the responsibilities of her position to inform Coogan of any lawsuits filed by employees. Coogan was informed of Complainant's grievance and EEOC charges alleging discrimination and retaliation.
60. Stuart's performance ratings have been consistently excellent.
61. Complainant seeks the following relief: appointment to the Pueblo Parole Supervisor position; appointment of McDonald to a different Parole Supervisor position; back pay and interest thereon, and attorney fees.

DISCUSSION

In this *de novo* proceeding, the burden is on Complainant to prove by preponderant evidence that the Respondent's action was arbitrary, capricious, or contrary to rule or law. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-50-103(6), C.R.S. Complainant bears the burden of proof on his discrimination and retaliation claims. Bodaghi v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000); Love v. RE/MAX of America, Inc., 738 F.2d 383 (10th Cir. 1984).

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. Metro Moving and Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995).

A. AGE DISCRIMINATION CLAIM

Complainant has not proven a prima facie case of age discrimination. Respondent has stipulated to the first three elements of the prima facie case: Complainant: belongs to a protected class (he is over 40); he applied for a position for which he was qualified; and he was rejected. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397, 400-401 (Colo. 1997).

The fourth element of the prima facie case is that the circumstances give rise to an inference of age discrimination. The circumstances in this case include the following facts: the person Coogan last hired for the Pueblo Parole Supervisor position, in 1997, McGuire, was

the same age as Stuart. In addition, in 1999, Coogan hired Zagorsky in a Parole Supervisor position, a man two years older than Stuart. Further, in 1995, Coogan had hired a woman Stuart's age and a man four years his senior into Parole Supervisor positions. In view of these facts, the undersigned cannot draw the inference that Stuart was not selected due to his age.

B. RETALIATION CLAIM

Complainant alleges that he was denied promotion in retaliation for exercising protected rights under the Colorado Anti-Discrimination Act ("the Act"), at section 24-34-402(1)(e)(IV), 7 C.R.S. (2000). This provision states:

"It shall be a discriminatory or unfair employment practice . . . for any person, whether or not an employer, . . . [t]o discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by this part 4, because he has filed a charge with the commission, or because he has **testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article . . .**" (Emphasis added)

To establish a prima facie case of retaliation under the Act, Complainant must establish: 1) he engaged in the protected activity of opposing discriminatory conduct or filing a charge with the commission; 2) he was subjected to adverse employment action; and 3) a causal connection exists between the protected activity and the adverse action. Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996). Once a plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a nondiscriminatory reason for the challenged action. The plaintiff may then demonstrate that reason to be a pretext for retaliation. Id.

Prima Facie Case of Retaliation.

Complainant has established that he engaged in protected conduct. First, he filed a grievance and charges of age discrimination and retaliation for testifying in a discrimination case in July 1997 and September 1998. Second, he reported McGuire's perceived discriminatory treatment of Hispanic staff, including Gallegos, who had filed a lawsuit, to McCee, who then reported that directly to Coogan. Stuart's general report of discriminatory conduct and his support of Gallegos' pending lawsuit constituted protected conduct under the bolded portion of section 24-34-402(1)(e)(IV), C.R.S., above. This language is identical to that in the retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. section 2000e-3(a). Therefore, federal case law interpreting this provision will be given persuasive authority herein. Colorado Civil Rights Commission v. Big O Tires, 940 P.2d 397 (Colo. 1997).

Opposition activity is protected when it is based on a mistaken good faith belief that the Act has been violated. Love v. RE/MAX of America, Inc., 738 F.2d 383, 385 (10th Cir. 1984). Those who "informally voice complaints to their superiors or who use their employers' internal grievance procedures" are protected under the Act. Robbins v. Jefferson County School Dist. R-1, 186 F.3d 1253, 1258 (10th Cir. 1999).

The next element of the prima facie case of retaliation is that Complainant suffered an adverse employment action. The Colorado Act lists refusal to promote as a prohibited adverse employment action. Section 24-34-402(1)(a), C.R.S.

Finally, Complainant must prove that there is a causal connection between his protected activity and Coogan's non-selection of him for the Parole Supervisor position. As a preliminary matter, Coogan knew about Stuart's protected activity. Coogan was the subject of Stuart's 1997 grievance alleging discrimination, retaliation, and harassment, and therefore was aware of it. McCee testified that Coogan was informed of all lawsuits filed by Division employees; therefore, he was aware of Complainant's 1998 lawsuit alleging discrimination and retaliation for testifying in a discrimination lawsuit. McCee reported to Coogan all of Stuart's reports regarding McGuire's discriminatory conduct towards Pueblo Hispanic staff and Gallegos. Coogan was informed of Gallegos' lawsuit once it was filed.

The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. Love v. RE/MAX of America, Inc., 738 F.2d 383, 386 (10th Cir. 1984). The inference of retaliation generally requires a "close temporal proximity" between the protected activity and the subsequent adverse action. Marx v. Schnuck Markets, Inc., 76 F.3d 324, 329 (10th Cir. 1996). For instance, the Tenth Circuit has held that a six-week period between protected activity and adverse action may, by itself, establish causation.

Generally, unless the adverse action is "very closely connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation." Id. at 328 (citations omitted; emphasis in original). Here, approximately six months passed between Complainant's reports of discriminatory behavior by McGuire and his non-selection, and even more time had passed since his grievance and EEOC charge. Therefore, additional evidence is necessary.

There is ample additional evidence in this record to establish a causal connection between Stuart's protected activity and his non-selection. In Love, supra, the plaintiff demonstrated the causal connection by showing that the employer's reasons for her termination "were unconvincing 'afterthoughts.'" Love, 738 F.2d at 386.

Coogan's proffered reasons for hiring McDonald also appear to be unconvincing afterthoughts. Coogan has offered three different reasons for his hiring decision:

1. McDonald's experience in different areas of parole is just as good, if not better than Stuart's (Coogan's written response to Stuart's grievance);
2. McDonald has superior interpersonal skills and the particular demands of the office (Coogan's affidavit); and,
3. Coogan wanted fresh blood in the office and Stuart had alliances with people in the Pueblo office (Coogan testimony at hearing).

The first of these reasons is objectively unsupportable by the evidence in this record. There is no conceivable way a reasonable person could conclude that McDonald's Parole experience was "just as good if not better" than Stuart's. Stuart had spent the past four years supervising Parole Officer II's at McDonald's level, and had over ten years of additional supervisory experience in DOC and as a police officer, while McDonald had in fact never supervised anyone. In addition, Coogan's own testimony at hearing rebuts this reason: he testified he was unaware of Stuart's Parole experience at the time he hired McDonald. See Findings of Fact #29 - 33. He therefore lacked a basis to make any comparison.

The second reason Coogan offered, in his sworn affidavit, was McDonald's superior interpersonal skills and the "particular demands of the office." Coogan never discussed or explained these issues at hearing; in fact he never even mentioned them. Coogan's attorney asked him at least once what the reasons were for hiring McDonald. The only reasons he gave were that he needed "fresh blood" in the Pueblo office and that Stuart had "alliances" with staff there, whereas McDonald had none. The second reason therefore looks like an "unconvincing afterthought."

Coogan's concern about Stuart's "alliances" with the Pueblo staff serves as direct evidence of a causal connection between his protected conduct and his non-selection. Coogan testified that he hired McDonald because he had "no preconceived ideas. No alliances," and that he believed Stuart did have alliances with staff in the Pueblo office. Coogan never explained what this meant.

The only evidence in this record regarding Stuart's alliances with staff is his report to McCee concerning McGuire's discriminatory behavior towards Hispanic staff. It is therefore reasonable to conclude that Coogan perceived Stuart as too closely allied with the Hispanic staff, one of whom had a lawsuit pending for which Stuart could be a witness. According to McCee, Coogan does not like employees that rock the boat or make waves. Stuart did so by filing his 1997 grievance, his 1998 EEOC charge, and by informing McCee of McGuire's discriminatory conduct. These actions were all protected conduct.

Lastly, the June 1997 memo to Stuart and others constitutes addition evidence of a

causal connection. It basically set forth a quid pro quo to the unsuccessful applicants: do not challenge this decision and you will be promoted at a later date. It stated, in part: "If you handle your disappointment well and exercise a bit of patience, we will be calling on you in the near future as positions of greater responsibility present themselves. Mr. Coogan will be discussing this with you individually in a few days." This memo, sent by Ron Truax, the Regional Manager who had conducted the interviews with Coogan, appears to represent the position of both Truax and Coogan, the ultimate hiring authority. It was copied to Coogan, and there is no evidence he disavowed the statement.

Stuart did not perform his end of the bargain. Instead of quietly "handling his disappointment well," Stuart filed a charge with EEOC alleging age discrimination, harassment, and retaliation. Notably, Coogan never did follow up by discussing Stuart's future promotional opportunities. This appears to be the first retaliatory "act" (a failure to act).

In view of the above additional evidence, Complainant has demonstrated a causal connection between his protected conduct and his non-selection. Therefore, he has made a prima facie case of retaliation.

Legitimate, Nondiscriminatory Reason for Stuart's Non-selection.

Respondent next has the burden of articulating a nondiscriminatory reason for the challenged action. Here, despite the glaringly different levels of qualification for the position at issue, the Rule of Three provides a legitimate non-discriminatory reason for Respondent's selection decision. DOC's Human Resources Division determined that McDonald met the minimum qualifications for the Parole Supervisor position, and referred his name as one of the finalists to the appointing authority for consideration. That fact alone, in the absence of a showing of some mistake, constitutes a legitimate reason for hiring him.

Pretext.

Complainant may next establish that the proffered reason was not the true reason for the employment decision, but was in fact a pretext for unlawful retaliation. Pretext may be proven either directly by demonstrating that an unlawful motive "more likely motivated the employer," or indirectly by showing that "the employer's proffered explanation is unworthy of credence." Texas Dept of Community Affairs v. Burdine, 450 U.S. 257, 101 S.Ct. 1089, 1095 (1981); Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1317 (10th Cir. 1999). Here, Stuart has proven pretext both directly and indirectly. Indirect proof will be addressed first.

Stuart has established pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate

reasons for its action that a reasonable fact finder could rationally find them unworthy of credence." Id. As listed and discussed above, Coogan has provided three different reasons for hiring McDonald. The first is completely unworthy of credence - it is simply not possible to objectively conclude that McDonald's Parole experience was as good as or better than Stuart's. Coogan also testified that he didn't even know Stuart's Parole experience at the time he hired McDonald. This alone establishes that Coogan's proffered reason for hiring McDonald was pretextual.

The same holds true for Coogan's claim that he hired McDonald because of his superior interpersonal skills. "The use of subjective factors supports an inference of pretext when an employer justifies rejection of [an individual that engages in protected conduct] on the basis of such subjective factors even though [that candidate] is objectively better qualified than the [individual] chosen." Bodaghi v. Department of Natural Resources, 995 P.2d 288, 300 (Colo. 2000).

At hearing, Coogan never explained how McDonald was better suited to the particular demands of the office, as he had stated in his sworn affidavit. Coogan's empty statement, without any support, explanation, or clarification at hearing, therefore looks like just another weak and implausible afterthought, unworthy of credence.

In failure to hire cases, a plaintiff may also prove pretext by demonstrating a "disparity in qualifications" that is "overwhelming." Bullington, 186 F.3d at 1319. This ALJ would find that to be the case here. In every single category, Stuart far exceeded McDonald. See Finding of Fact #41. Stuart had spent four years as a Parole Officer III, supervising parole officers at the II, I, and Intern level, in tandem with the Parole Supervisor. He already knew the position. He had supervised individuals at McDonald's level for four years.

McDonald had never exercised supervisory authority over a work unit of other Parole staff. Nor had he had supervisory authority in any of his previous positions, unless he managed one or two staff as assistant manager at the photography shop. If such is the case, that evidence is not in the record.

Stuart had a total of fourteen years of supervisory experience, including service as a Major in DOC and as a Police Sergeant. His sixteen-year career in law enforcement gave him critical experience in assisting and training subordinate Parole Officers in handling drug cases, making arrests, tracking fugitives, and working in tandem with law enforcement. McDonald had no prior law enforcement experience. Stuart was overwhelmingly more qualified for the Parole Supervisor position than McDonald.

Pretext may also be proven indirectly by demonstrating pre-selection. See Randle v. City of Aurora, 69 F.3d 441 (10th Cir. 1995). Here, Coogan testified that he was unclear

on Stuart's supervisory role as Parole Officer III, was unaware of his prior Parole experience, and was unfamiliar with his prior professional experience. A reasonable inference to be drawn is that he knew what he needed going in: he was not going to hire Stuart.

Pretext may also be proven directly through evidence showing that an unlawful motive more than likely motivated the employment decision. Burdine, supra. Direct evidence in this case demonstrates pretext. McCee told Stuart that Coogan didn't like employees that rock the boat or make waves. Coogan testified that he didn't hire Stuart because of his alliances with the Pueblo staff. The only alliances with Pueblo staff Coogan knew about was Stuart's report of McGuire's discriminatory conduct towards Hispanic officers, including Gallegos, who had a lawsuit pending. Following the June 1997 memo requiring that "disappointment be handled appropriately," Stuart filed suit, and Coogan never discussed future promotional opportunities with Stuart. There is direct evidence in this record establishing that Coogan was more than likely motivated by retaliation in refusing to hire Stuart.

In summary, any one of the above findings of pretext would warrant the conclusion that Coogan's proffered reasons for hiring McDonald were a pretext for retaliation against Stuart. Here, we have multiple demonstrations of pretext. It is therefore concluded that Coogan did not select Stuart for the Parole Supervisor position because he had "rocked the boat" by testifying in a discrimination lawsuit before, by again reporting discriminatory conduct by McGuire against Gallegos, who had another discrimination lawsuit pending, and other Hispanic officers in the Pueblo office, by filing charges of discrimination and retaliation for testifying in a discrimination case in 1998; and by grieving his 1997 non-selection as retaliatory and discriminatory. Such non-selection was a discriminatory or unfair employment practice prohibited under the Colorado Anti-Discrimination Act at section 24-34-402(1)(e)(IV), 7 C.R.S. (2000).

C. Remedy.

The Colorado Anti-Discrimination Act authorizes the following relief: "back pay; hiring, reinstatement, or upgrading of employees, with or without back pay" Section 24-34-405, C.R.S. Board Rule R-9-6 contains identical language.

If employers were permitted to retaliate against persons who exercise protected rights under the discrimination laws, "it would have a chilling effect upon employees' willingness to make charges or support others' charges." Deavenport v. MCI Telecommunications Corporation, 973 F.Supp. 1221, 1226 (D.Colo. 1997). Enforcement of the retaliation provision of our Act therefore plays a central role in assuring compliance with the Act.

In cases such as this, the remedy should "be fashioned to make the plaintiff whole or

return him as nearly as possible to the economic situation he would have enjoyed but for the defendant's illegal conduct." Carr v. Fort Morgan School Dist., 4 F.Supp.2d 989 (D.Colo. 1998).

The only way to make Stuart whole is to place him in the Pueblo Parole Supervisor position. Stuart introduced evidence demonstrating that after he was rejected for this Parole Supervisor position, DOC continued to deny him promotions to numerous other open Parole Supervisor and Regional Manager positions. In view of this continued pattern of failing to promote him, an order that Respondent simply consider Stuart for the next available Parole Supervisor position would "provide no effective remedy for the previous discriminatory action found to have occurred. It would merely . . . [allow] that practice to continue." Cunningham v. Department of Highways, 823 P.2d 1377 (Colo.App. 1991).

ATTORNEY FEES

Complainant requests attorney fees and costs under section 24-50-125.5, C.R.S., which states in part:

"if it is found that the personnel action . . . was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee bringing the appeal or the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency. . . ."

Board Rule R-8-38 provides the following guidance in interpreting this statutory provision:

"A frivolous personnel action shall be defined as an action or defense in which it is found that no rational argument based on the evidence or the law is presented."

A personnel action made in bad faith, that was malicious, or was used as a means of harassment "shall be defined as an action or defense in which it is found that the personnel action was pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth."

"A groundless personnel action shall be defined as an action or defense in which it is found that despite having a valid legal theory, a party fails to offer or produce **any** competent evidence to support such an action." (emphasis in original)

Since Coogan's decision not to hire Stuart was based on intentional retaliation against Stuart for engaging in conduct protected by the Colorado Anti-Discrimination Act, it was in bad

faith. Stuart is therefore entitled to attorney fees and costs.

CONCLUSIONS OF LAW

1. Respondent's non-selection of Complainant was arbitrary, capricious or contrary to rule or law;
2. Respondent's non-selection of Complainant was not made on the basis of intentional age discrimination;
3. Respondent's non-selection of Complainant was retaliatory;
4. Complainant is entitled to an award of attorney fees and costs.

ORDER

Respondent is ordered to place Complainant in the position of Parole Supervisor in the Pueblo office of the Division. Complainant is awarded back pay and attorney fees and costs.

DATED this 22nd day of
January, 2001, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, Colorado 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections

24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the 22nd day of January, 2001, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

William Finger.
2905 A Upper Bear Creek Road
P.O. Box 1477
Evergreen, CO 80437-1477

and in the interagency mail, addressed as follows:

Cristina Valencia
Assistant Attorney General
Personnel and Employment Law Section
1525 Sherman Street, Fifth Floor
Denver, CO 80203
